United States Court of Appeals

for the Second Circuit

APPENDIX

75-7157

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

x- -x

MARVIN STONE,

Plaintiff-Appellant

v. No. 75-7157

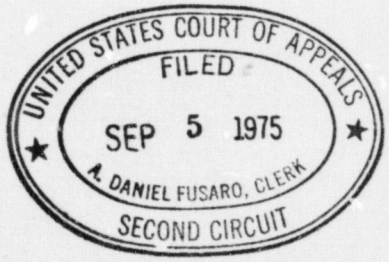
UNDERWRITERS AT LLOYD'S LONDON,
NORTH STAR REINSURANCE CORP., and
FIRST STATE INSURANCE COMPANY,

Defendants-Appellants

x- -x

BRIEF AND APPENDIX FOR APPELLANT

x- -x



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New York, New York 10019
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PAGINATION AS IN ORIGINAL COPY

Chicago office (see Exhibit H, the basic Lloyd's policy

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qualified and honest before concluding his $700,000

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Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARVIN STONE,

Plaintiff-Appellant

v.

No. 75-7157

UNDERWRITERS AT LLOYD'S LONDON,
NORTH STAR REINSURANCE CORP., and
FIRST STATE INSURANCE COMPANY,

Defendants-Appellants

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BRIEF FOR APPELLANT

Statement

Plaintiff Marvin Stone appeals from the order of the District Court for the Southern District of New York, dated January 31, 1975 (per Motley, D.J.), which dismissed the complaint in this action, without leave to replead, on the ostensible ground that it failed to state a claim upon which relief can be granted. Following the dismissal of the action, appellant (appearing pro se) filed a timely notice of appeal, and thereafter by order of this Court, the time of appellant to serve and file his brief and appendix was

The object of Rule 12 is to facilitate

extended to September 5, 1975. Appellant was also granted leave to serve and file typewritten briefs and appendices.

Question Presented

Whether a complaint alleging a course of conduct by defendants amounting to negligence or negligent misrepresentation in issuing policies of assayer's "errors and omissions" insurance, with certificates thereof issued to plaintiff, vouching the bona fides of an assayer of precious metals, and upon which plaintiff relied in entering into a substantial transaction to his damage, is legally sufficient as a matter of law.

Statement of the Case

This action was filed in the District Court for the Southern District of New York on March 5, 1973, and was assigned to District Judge Constance Baker Motley, under the individual assignment plan. Service of process was effected and thereafter under date of March 27, 1973, separate answers were filed by the three defendants, all appearing by the same firm of attorneys. The oral pre-trial deposition of plaintiff

defendants. When plaintiff pointed out that the policies of

was then commenced, but discontinued prior to its completion. (See Docket Entries, page B.)

By notice of motion dated April 19, 1974, defendants moved "for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings and a dismissal of the plaintiff's complaint." Attached to the notice of motion was the affidavit of Thomas W. Wilson, one of the attorneys for defendants, and copies of the insurance policies written by defendants to its assured in this case, an assayer named John B. O'Malley, Jr. of Aurora, Colorado. The motion was noticed for May 3, 1974. In light of the nature of the motion, plaintiff submitted only a memorandum of law in opposition thereto and defendants thereafter filed a reply memorandum. All papers on the motion were before the district court by June 3, 1974.

On January 31, 1975, the district court filed an indorsed order dismissing the complaint, with the following handwritten memorandum indorsed on the back of the notice of motion:

> "For the reasons set forth in defendants' memoranda, the within motion for judgment on the pleadings which the court also treats as a motion to dismiss the complaint for failure to state a claim upon

the juridical basis of that court's decision. From the law

> which relief may be granted (see paragraph 6 of each answer and pages 1-2 of defendants' memorandum of law in support of the within motion) is granted and the complaint is hereby dismissed.
>
> So Ordered
>
> N.Y. N.Y.
> 1/29/75 Constance Baker Motley
> U.S.D.J."

The reference to paragraph 6 of each answer is as follows:

> "6. The complaint fails to state a claim against defendant, upon which relief can be granted."

The reference to pages 1-2 of defendants' memorandum of law reads as follows:

> "The defendants seek a dismissal of the complaint on the grounds that the complaint fails to state a claim for which any relief may be granted."

Since these are the only references relied upon by the district court in dismissing the complaint, it becomes necessary to examine the motion papers and memoranda of law before the court to determine, if possible, the basis for the court's decision, as well as to set forth plaintiff's contentions on the motion.

On its face, the notice of motion declared that

It matters little how we characterize or label the

it was brought pursuant to Rule 12(c), Federal Rules of Civil Procedure, for judgment on the pleadings and a dismissal of the complaint. In their memorandum of law defendants declared that they "seek a dismissal of the complaint on the ground that the complaint fails to state a claim for which any relief may be granted." Plaintiff approached the motion as essentially grounded in both parts of Rule 12, F.R.Civ.P., that is, Rule 12(c) and Rule 12(b)(6) (failure to state a claim upon which relief can be granted). If the motion is grounded in Rule 12(c), then the papers before the court should be limited to the pleadings of the parties, as required by the rule (2A Moore's Federal Practice, Par. 12.15, pp. 2343-2350), unless the court considers matters outside the pleadings so as to convert it to a motion for summary judgment. The rule reads in full as follows.

> "(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in

> Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

It is to be noted that an affidavit by Thomas W. Wilson, one of defendants' attorneys, accompanied the notice of motion. The decision of the court does not disclose what use, if any, the court made of such affidavit. In any event, the motion does not appear to have been treated as one under Rule 56, and there was no call upon plaintiff to submit any affidavits or other proof in response to a motion for summary judgment. Thus, in treating this as a motion for judgment on the pleadings, the district court necessarily was limited to considering the pleadings only.

If the motion was treated as made under Rule 12 (b)(6), as seems to be the case from the court's memorandum decision, then the court was limited to the face of the complaint only in considering its legal sufficiency. See 2A Moore's Federal Practice, Par. 12.08, pp. 2265-2286.

In his answering memorandum, plaintiff discussed all the technical problems engendered by the form of the motion and to other positions taken by defendants. In light of the court's decision, it appears necessary to state

plaintiff's position and arguments before the district court as to the nature and scope of defendants' motion. Plaintiff stated, as he has here, that the motion was brought pursuant to Rule 12(c), for judgment on the pleadings. If so, then the motion was limited to the pleadings. Thus the Wilson affidavit and exhibits attached thereto should not properly be considered on a strict motion for judgment on the pleadings. Since the defendants' memorandum of law stated (pp. 1-2) the motion was for dismissal of the complaint "on the grounds that the complaint fails to state a claim for which any relief may be granted," then it was really a Rule 12(b)(6) motion, where only the complaint should be considered. The last technical problem discussed by plaintiff was treating the motion as one for summary judgment under Rule 56. The district court apparently did not consider the motion as one for summary judgment, thus this aspect of the applicable rules will not be further discussed in this brief.

We are therefore reduced to considering this motion as one either for judgment on the pleadings, or for dismissal of the complaint for legal insufficiency. It is plaintiff's contention that judgment on the pleadings applies only where the answer disposes of the claim as a matter of law. See,

e.g., 2A Moore's Federal Practice, Par. 12.15, pp. 2342-2350. Here the answers filed by the defendants amounted to general denials of plaintiff's operative allegations, together with an affirmative defense (paragraph 6) of legal insufficiency of the complaint. If the district court intended to have this action determined by the policies of insurance, to which reference was made in the answers (as well as in the complaint), as constituting conclusive proof of the failure of plaintiff to plead a claim against defendants, then the court could (and should) have made some statement to this effect in its memorandum decision. However this was not done, and plaintiff can only surmise that the basis for the court's decision was its determination of such legal insufficiency of the complaint that even repleading could not cure it.

Accordingly, plaintiff treats the court's decision as being under Rule 12(b)(6), that the complaint is legally insufficient as a matter of law, without granting leave to replead on the theory that no amount of repleading would enable plaintiff to allege a claim against these defendants upon the facts of this case.

The Pleadings

Plaintiff alleged in his complaint that the defendants insured one John B. O'Malley, Jr. of Aurora, Colorado, by several policies of insurance, aggregating coverage of $4,000,000, against so-called "assayer's errors and omissions." He also alleged (paragraph 6 of the complaint) that O'Malley "represented himself and was represented to plaintiff to be a qualified professional engineer in the fields of mechanical engineering, and chemistry metallurgical analysis and assaying and the holder of various policies of insurance issued by defendants Lloyds, North Star and First State, in the aggregate amount of $4,000,000, insuring said John B. O'Malley, Jr. against liability for assayer's errors and omissions." He then alleged (paragraph 7) that in reliance upon the representations and warranties of O'Malley, "and upon the fact that the defendants Lloyds, North Star and First State had issued unto Mr. O'Malley the aforesaid policies of insurance and of certain certificates of insurance unto plaintiff, each dated March 20, 1972, and upon a certain written assay by Mr. O'Malley, dated March 25, 1972, plaintiff entered into a transaction for a consideration of

$700,000 whereby he purchased and acquired fifty-three certain metal bars, weighing approximately 780 pounds in the aggregate, allegedly containing precious metals including, among others, gold, silver, platinum, palladium and rhodium". Thereafter, plaintiff learned that the metal bars were in fact worthless.

Paragraph 10 of the complaint then alleged:

> "10. Defendants Lloyd's, North Star and First State knew or should have known that plaintiff would rely upon the fact that each of said defendants had issued unto said John B. O'Malley, Jr., the aforesaid policies of insurance and had issued unto plaintiff the aforesaid certificates of insurance; and that plaintiff would rely upon the purported reputation and standing of Mr. O'Malley as a reputable and qualified assayer, as evidenced by the fact that said defendants Lloyd's, North Star and First State had insured Mr. O'Malley against assayer's errors and omissions in the aggregate amount of $4,000,000, in accepting the aforesaid written assay issued by Mr. O'Malley and in accepting the aforesaid certificates of insurance issued by said defendants unto plaintiff, each dated March 20, 1972, and in entering into the aforesaid transaction for the purchase and acquisition by plaintiff of the metal bars allegedly containing precious metals."

Plaintiff then alleged that as a result of the foregoing he had been damaged by the defendants in the amount of $1,300,000.

The defendants each filed a separate answer, the gist of which consisted of an admission only of the issuance of the policies of insurance to O'Malley and a general denial of everything else. As an affirmative defense, the defendants each alleged that the complaint failed to state a claim upon which relief can be granted.

The Facts

The facts pleaded in the complaint, taken together with the documents before the court relating to the issuance of the three insurance policies to O'Malley, present enough to enable the court to determine the factual sufficiency of the complaint.

The three policies of insurance were issued to O'Malley, a resident of Aurora, Colorado, covering his activities as a professional engineer in the fields of mechanical engineering and chemistry, metallurgical analysis and assaying. The policies were issued by the defendants' general agent, R. B. Jones, Inc., from either their Chicago, Illinois or Kansas City, Missouri office, for a substantial premium. Prior to the issuance of these policies O'Malley submitted his qualifications to R. B. Jones, Inc. at their

Chicago office (see Exhibit H, the basic Lloyd's policy attached to the Wilson affidavit, including a letter from O'Malley to R. B. Jones, Inc., dated January 10, 1972, outlining his qualifications and referring to other materials previously submitted), and Jones apparently investigated O'Malley's qualifications and bona fides before issuing these policies. The fact that O'Malley had these policies covering his "assayer's errors and omissions" to the extent of $4,000,000, was made known to plaintiff prior to his entering into the transaction involving the so-called precious metals or "platinum" bars. Plaintiff relied upon the fact of the issuance of these policies as evidence of O'Malley's qualifications and bona fides, and the defendants' general agent knew that plaintiff was so relying. Prior to the time plaintiff entered into the "platinum" bars deal, he was in detailed communication with R. B. Jones' office concerning O'Malley; and it was following this communication that the certificates of his interest in the O'Malley policies were issued. Thus plaintiff investigated O'Malley's qualifications and bona fides with R. B. Jones, Inc. before entering into the transaction. Clearly he relied upon the representations both implicitly and explicitly made by the

defendants' general agent as to O'Malley being competent, qualified and honest before concluding his $700,000 transaction. All of these facts are within the contemplation of the complaint, if not explicitly alleged. The documents submitted with the motion or incorporated by reference into the pleadings so demonstrate.

The defendants' theory of this action is that plaintiff is improperly bringing a direct action against insurers, instead of first proceeding against their assured for his "errors and omissions," and that such direct actions are precluded by the statutory law of various states. Plaintiff submits that this action is grounded solely and only in defendants' own conduct, and is not derivative in nature.

Argument

A COMPLAINT ALLEGING A COURSE OF CONDUCT BY DEFENDANTS AMOUNTING TO NEGLIGENCE OR NEGLIGENT MISREPRESENTATION IN ISSUING POLICIES OF ASSAYER'S "ERRORS AND OMISSIONS" INSURANCE, WITH CERTIFICATES THEREOF ISSUED TO PLAINTIFF, VOUCHING THE BONA FIDES OF AN ASSAYER OF PRECIOUS METALS, AND UPON WHICH PLAINTIFF RELIED IN ENTERING INTO A SUBSTANTIAL TRANSACTION TO HIS DAMAGE, IS LEGALLY SUFFICIENT AS A MATTER OF LAW.

It has been the principal contention and argument of plaintiff throughout this case that his claim against the defendants is valid and well pleaded, and is based upon the conduct of the defendants, and not upon any theory of derivative liability emanating from the negligence, errors or omissions of their assured. The factual pattern of this case, as disclosed by the complaint, is that plaintiff relied upon the affirmative representations and assurances of the defendants, made through their disclosed general agent, R. B. Jones, Inc., that O'Malley was a competent, reputable and qualified assayer upon whom plaintiff could, and did, rely in entering into a transaction for $700,000, in the acquisition of the so-called precious metals bars. It was long after this transaction that plaintiff learned, contrary to

the written assay report of O'Malley, that the bars were worthless. Plaintiff alleges he would not have entered into the transaction but for the representations and assurances of defendants, and the fact that they had insured O'Malley for $4,000,000 against his errors and omissions. Moreover, prior to plaintiff concluding this transaction, defendants issued certificates of insurance covering plaintiff's interest in these policies. Plaintiff's reliance upon these policies is undoubted. This is the gravaman of the complaint.

For the purposes of a motion under Rule 12(b)(6), F.R.Civ.P., the well pleaded material allegations of a complaint are taken as admitted and as true. Haines v. Kerner, 404 U.S. 519 (1972); Conley v. Gibson, 355 U.S. 41 (1955); Walker Process Equipment v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Gardner v. Toilet Goods Association, 387 U.S. 167; Murray v. City of Milford, 380 F.2d 468 (2nd Cir. 1967); A. T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd Cir. 1967); Vine v. Beneficial Finance Co., 374 F.2d 627 (2nd Cir. 1967); Dioguardi v. Durning, 139 F.2d 774 (2nd Cir. 1944). This is especially so in the federal practice where the "notice" theory of pleading is followed. Nagler v. Admiral Corp., 248 F.2d 319, 322 (2nd Cir. 1957, per

Clark, C.J.); Rule 8(a)(2), F.R.Civ.P.

The object of Rule 12 is to facilitate a decision on the merits, and there shall be no dismissal where it is not clear beyond a reasonable doubt that the plaintiff is unable to prove his right to relief as a matter of law, Conley v. Gibson, supra; or that plaintiff could prove no set of facts in support of his claim which would entitle him to relief, Haines v. Kerner, supra, citing Conley v. Gibson, supra, and Dioguardi v. Durning, supra. A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim, Arfons v. E. I. DuPont de Nemours & Co., 261 F.2d 434 (2nd Cir. 1958). Pleadings are to be liberally construed to do substantial justice between the parties, Maty v. Grasselli Chemical Co., 303 U.S. 197, 200 (1938, per Black, J.); Rule 8(f), F.R.Civ.P.

Initially in their argument before the district court the defendants contended that plaintiff was barred from maintaining this action by reason of the New York no-direct-action-against-insurers statute (New York State Insurance Law, Sec. 167), on the theory that this action was really against

6. Thereafter and on or about May 5, 1972, Mr.

defendants' assured, O'Malley, and was derivative as against defendants. When plaintiff pointed out that the policies of insurance were not written in New York and did not cover a New York assured, and therefore New York's insurance law did not apply, defendants then, in their reply memorandum, attempted to relate the law of Colorado, Missouri and Illinois, three possible states whose laws might cover the issuance of the policies of insurance, to this case. In each instance defendants adhered to their fundamental argument that this action was derivative, and was based upon O'Malley's assay report to plaintiff, for which plaintiff must first recover judgment against O'Malley before proceeding against his insurers.

After plaintiff made known his theory of this case, in his response to defendants' motion for judgment on the pleadings, the defendants replied that "plaintiff's purported cause of action does not come under the holding of any reported case or statute cited as authority by the plaintiff." (Defendants' Reply Memorandum of Law, p. 6) The defendants also contended that "there is no cognizable claim upon which the present action may be maintained." (Ibid, p. 6)

Since there was no opinion or memorandum of any

Insurance issued said defendants unto plaintiff, each dated

kind by the district court, it is almost impossible to fathom the juridical basis of that court's decision. From the law covering this subject, it seems clear that a basis of action exists upon which to impose liability against these defendants.

Defendants apparently still misconceive the nature of this action and the thrust of plaintiff's complaint. Simply stated, plaintiff maintains that in the totality of the factual circumstances of this case, defendants' conduct amounts to what may be characterized as "negligence" or "negligent misrepresentation" or some other species of tort liability, for which plaintiff may directly sue these defendants to recover his damages. Such actions are known in law and do serve as a basis for imposing liability for harm and damages against these defendants. See, Prosser, Torts (4th ed., 1971), Chapter 18, Misrepresentation, pp. 683-736, and especially Par. 107, Basis of Responsibility, pp. 704-710; and Hill, Damages for Innocent Misrepresentation, 73 Col. Law Rev. 679 (1973). See also the leading cases on this subject, including, among others, Glanzer v. Shepard, 233 N.Y. 236 (1922), per Cardozo, J.; Ultramares Corp. v. Touche Niven & Co., 255 N.Y. 170 (1931), per Cardozo, Ch.J.; State Street

Trust Co. v. Ernst, 278 N.Y. 104 (1938); and their progeny.

It matters little how we characterize or label the basis of defendants' liability, as negligence, deceit, fraud, wilful misrepresentation, innocent misrepresentation or negligent misrepresentation. The test is actionability, and under any of the foregoing theoretical labels (or none at all) liability may be imposed against defendants in this action.

Plaintiff had not as yet undertaken his pre-trial discovery proceedings of defendants at the time the defendants moved for dismissal of the complaint (the defendants suspended completion of the oral pre-trial deposition of plaintiff to bring on the dismissal motion). Although plaintiff is not now in position to review or discuss the evidence to support his complaint, nevertheless from the bare bones of the complaint, and from defendants' answers and motion papers, enough is before the court to establish essentially plaintiff's claim. Plaintiff alleges he relied upon defendants' representations to him as to O'Malley's bona fides, as to his qualifications, competency and reputability, prior to completing the "platinum" bars transaction. He was specifically made a "third-party beneficiary" of the

three insurance contracts through the issuance to him of the certificates of insurance, prior to the closing. The fact that defendants insured O'Malley for $4,000,000, covering his assayer's "errors and omissions," and published this fact to plaintiff as evidence of O'Malley's bona fides, also was done prior to the closing. The defendants investigated O'Malley's credentials and qualifications prior to their writing this insurance, as can be seen from exhibits attached to the policies. The fact that defendants investigated O'Malley was made known by them to plaintiff. The defendants were paid a substantial premium by O'Malley for writing this insurance, and thus their relationship to him was a pecuniary one. It was to their pecuniary interest to represent O'Malley as a qualified, competent and reputable assayer, or else they should not have accepted him as an assured for this highly specialized type of coverage. Plaintiff alleges his reliance upon the representations as to O'Malley's bona fides made to him by R. B. Jones, Inc., defendants' agents; and Jones knew of plaintiff's reliance upon such representations. The fact that defendants' investigation of O'Malley may have been negligently done, or that it failed to turn up true facts of O'Malley's lack of qualifications, credibility and competence,

is evidence of defendants' tortious conduct. It was the defendants' conduct which constitutes the operative actionable tortious facts upon which defendants' liability is predicated.

Defendants argued before the district court that "plaintiff's purported cause of action does not come under the holding of any reported case or statute cited as authority by the plaintiff" (supra). While it is true that plaintiff did not spell out in detail before the district court the relevant authorities supporting the pleading of his claim, yet his reference to Prosser, Torts (4th ed., 1971), also cited above, was sufficiently definitive to demonstrate the basic law upon which he relies in this case.

Even if we start with the proposition that at the pleading stage the choice of law governing this case is not yet sufficiently determined (see Auten v. Auten, 308 N.Y. 151 (1954)), we may nevertheless seek to ascertain the applicable common law from appropriate authority. The touchstone case of Glanzer v. Shepard, supra, authorizing recovery for negligent misrepresentation, was the definitive American break from the strictures of Derry v. Peek, 14 A.C. 337 (1889), the leading English authority which had precluded

any such recovery. In his article in 73 Col. Law Rev. 679, supra, Professor Alfred Hill reviews these authorities (see ibid, pp. 684-692, and footnotes therein) and then comes upon what he calls the "distinctive federal viewpoint" (fn. 31).

The federal cases have as their leading authority the case of Stein v. Trager, 182 F.2d 696, 699 (D.C. Cir. 1950, per McAllister, C.J.), which holds as follows:

> "Where a party innocently misrepresents a material fact by mistake, or makes such representation without knowing it to be true or false, even though he believes it to be true; or without reasonable grounds for believing it to be true - such representation will support an action for fraud. Anderson v. Tway, 6 Cir. 143 F2d 95, certiorari denied 324 U.S. 861, 65 S.Ct. 865, 89 L Ed. 1418; Sovereign Pocohontas Co. v. Bond, et al, 74 App. D.C. 175, 120 F2d 39; Grand Trunk Western R Co. v. H. W. Nelson Co., 6 Cir, 116 F2d 823; Schwinn v. United States, 9 Cir, 112 F2d 74, affirmed 311 U.S. 616, 61 S.Ct. 70, 85 L Ed. 390; Panther Rubber Mfg Co. v. Commissioner, 1 Cir. 45 F2d 314; Nocatee Fruit Company v. Fosgate, 5 Cir, 12 F2d 250."

Although couched in terms of fraud by this case, nevertheless the action lies as one of negligent misrepresentation. Following and supporting this authority is the case of Isen v. Calvert Corporation, 379 F.2d 126, 129-130, fn. 11, 12 (D.C. Cir. 1967). See also, in another context, United States v.

Neustadt, 366 U.S. 696, 705-708 (1961), especially fn. 15, 16, which makes the point that "negligent misrepresentation" is actionable under federal law, but not against the government under the Federal Tort Claims Act (28 U.S.C. Sec. 2680). See also Mr. Justice Whittaker's reliance upon the Restatement of Torts (1938), Sec. 552. It is to be noted that the Supreme Court in Neustadt relied upon this Court's decision by late Circuit Judge Jerome N. Frank in Jones v. United States, 207 F.2d 563 (2nd Cir. 1953), cert. den. 347 U.S. 921 (1954). Cf. Hall v. United States, 274 F.2d 69 (9th Cir. 1959).

Thus it is fair to state that the basic thrust of plaintiff's complaint in pleading a claim against defendants is that such claim is legally sufficient to warrant pre-trial proceedings and a trial on the merits. Accordingly, the order dismissing the complaint was improperly made and should be reversed.

Conclusion

For all the foregoing reasons, the order dismissing the complaint should be reversed and the case remanded to the district court.

Respectfully submitted,

Daniel H. Greenberg

DANIEL H. GREENBERG
Attorney for Plaintiff-Appellant

September 2, 1975

APPENDIX

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RELATED CASE: [illegible] CIV.4757

CIVIL DOCKET

UNITED STATES DISTRICT COURT

73 CIV. 955

JUDGE MOTLEY

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
MARVIN STONE	For plaintiff:
Vs.	Murray J.Chikofsky,Esq.
Underwriters at LLOYD'S LONDON,c/o Mendes&Mount	342 Madison Ave.
North Star Reinsurance Corp.and	NYC,NY 10017
First State Insurance Co.	212-986-4225
	For defendant:
	Kroll,Edelman,Elser & Wilson(First
	22 East 40th Street State Ins. Co)
	New York, N.Y. 10016 (deft's)
	Mu 6-2686

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk			3/5/73	Chikofsky	15	
				3/6/73	[illegible]		15
J.S. 6 mailed ✓	Marshal						
Basis of Action: Errors&Omissions of Assayer. $1,300,000.	Docket fee						
of insurance policies.	Witness fees						
Action arose at:	Depositions						
			1A				

73 Civ.955 Marvin Stone Vs. Underwriters at Lloyd's London et al.

'73 CIV. 955

JUDGE MOT

DATE	PROCEEDINGS	Date Ord. Judgment
ar.5,73	Filed Complaint and issued Summons.	
ar.27-73	Filed ANSWER to complaint of first State Insurance Co.	K,E,F
ar.27-73	Filed ANSWER to complaint of Underwriter at Lloyd's.	" "
ar.27-73	Filed " " " " North Star Reinsurance Co.	" "
ar.27-73	Filed deft's notice to take deposition of pltff. on 4-6-73.	
ar.23-73	Filed summons with marshals return: Served. Mendes & Mount on 3-7-73 North Star Reinsurance Corp. on 3-7-73. First State Insurance Co. on 3-9-73.	
r. 24-74	Filed defts' affdvt. of Thomas W. Wilson and notice of motion for an order for judgment on the pleadings and to dismiss. Ret. 5-3-74.	
r. 24-74	Filed defts' memorandum of law in support of motion for judgment on the pleadings.	
ay 3-74	Filed pltffs memorandum of law in opposition to defts motion for judgment on the pleadings.	
Jun 3-74	Filed defts Reply memorandum in support of motion to dismiss the complaint.	
n. 31-75	Filed memo endorsed on motion filed 4-24-74. For the reasons set forth in defts' memoranda, the within motion, for judgment on the pleadings, which the court also treats as a motion to dismiss the complaint for failure to state a claim which relief may be granted, etc. as indicated, is granted and the complaint is hereby dismissed. So ordered- MOTLEY, J. (m/n)	
eb. 28-75	Filed pltff's notice of appeal from from order filed 1-31-75 dismissing the complai Copy to: Kroll, Edelman, Elser & Wilson. Entered- 3-4-75	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MARVIN STONE, :

Plaintiff, :

-v- :

UNDERWRITERS AT LLOYD'S LONDON, :
NORTH STAR REINSURANCE CORP.,
and FIRST STATE INSURANCE COMPANY, :

Defendants. :

----------x

COMPLAINT

73 Civ. _____

Plaintiff, by MURRAY J. CHIKOFSKY, his attorney, for his complaint against the defendants, alleges:

1. This action is brought pursuant to the provisions of Title 28, United States Code, § 1332, and is between citizens of different states. The amount in controversy exceeds the amount of $10,000, exclusive of interest and costs.

2. Plaintiff is a citizen and resident of the City of Toronto, Province of Ontario.

3. Defendant Underwriters at Lloyd's, London (hereinafter referred to as "Lloyd's"), is an insurance organization of London, England, engaged in business in the Southern District of New York, which issued a policy of insurance under date of January 31, 1972, bearing No. 91861, insuring one John B.

O'Malley, Jr., of the City of Aurora, State of Colorado, against so-called assayer's errors and omissions in the amount of $250,000 for each claim. Said policy of insurance provided, among other things, for notice of claims and service of process to be made upon certain representatives located within the Southern District of New York.

4. Defendant North Star Reinsurance Corp., (hereinafter referred to as "North Star"), is an insurance corporation, organized under the laws of the State of New York, engaged in business in the Southern District of New York, which issued a policy of insurance under date of February 4, 1972, bearing No. USX 10186, insuring said John B. O'Malley, Jr., against so-called assayer's errors and omissions in the amount of $750,000 for each occurrence in excess of $250,000.00.

5. Defendant First State Insurance Company (hereinafter referred to as "First State") is an insurance corporation, organized under the laws of the State of Delaware, engaged in business in the Southern District of New York, which issued a policy of insurance under date of February 7, 1972, bearing No. 900286, insuring said John B. O'Malley, Jr., against so-called assayer's errors and omissions in the amount of $4,000,000 for each occurrence in excess of $1,000,000.00.

6. Heretofore and on or about March 15, 1972, and thereafter, in the Southern District of New York and elsewhere, said John B. O'Malley, Jr., represented himself and was represented to plaintiff to be a qualified professional engineer in the fields of mechanical engineering, and chemistry metallurgical analysis and assaying, and the holder of various policies of insurance issued by defendants Lloyd's North Star and First State, in the aggregate amount of $4,000,000, insuring said John B. O'Malley, Jr., against liability for assayer's errors and omissions.

7. In reliance upon the representations and warranties of said John B. O'Malley, Jr., as aforesaid, and upon the fact that the defendants Lloyd's, North Star and First State, had issued unto Mr. O'Malley the aforesaid policies of insurance and of certain certificates of insurance unto plaintiff, each dated March 20, 1972, and upon a certain written assay by Mr. O'Malley, dated March 25, 1972, plaintiff entered into a transaction for a consideration of $700,000, whereby he purchased and acquired fifty-three certain metal bars, weighing approximately 780 pounds in the aggregate, allegedly containing precious metals including, among others, gold, silver, platinum, palladium and rhodium.

8. Thereafter and on or about May 3, 1972, Mr. O'Malley certified in writing under oath that said fifty-three metal bars allegedly containing the precious metals as aforesaid, and marked and identified by Mr. O'Malley, were the same metal bars described in his written assay report dated March 25, 1972.

9. Thereafter and on or about October 11, 1972, plaintiff learned that said fifty-three metal bars did not contain any measurable amount of precious metals and were in fact worthless.

10. Defendants Lloyd's, North Star and First State knew or should have known that plaintiff would rely upon the fact that each of said defendants had issued unto said John B. O'Malley, Jr., the aforesaid policies of insurance and had issued unto plaintiff the aforesaid certificates of insurance; and that plaintiff would rely upon the purported reputation and standing of Mr. O'Malley as a reputable and qualified assayer, as evidenced by the fact that said defendants Lloyd's, North Star and First State had insured Mr. O'Malley against assayer's errors and omissions in the aggregate amount of $4,000,000, in accepting the aforesaid written assay issued by Mr. O'Malley and in accepting the aforesaid certificate of

stands in no better position than [illegible]

insurance issued by said defendants unto plaintiff, each dated March 20, 1972, [illegible] in entering into the aforesaid transaction for the purchase and acquisition by plaintiff of the metal bars allegedly containing precious metals.

11. As a result of the foregoing, plaintiff has been damaged by defendants Lloyd's, North Star and First State, in the amount of $1,300,000.00.

WHEREFORE, plaintiff demands judgment against the defendants Lloyd's, North Star and First State, in the amount of $1,300,000.00, together with appropriate interest and the costs and disbursements of this action.

PLAINTIFF DEMANDS TRIAL BY JURY

/s/ Murray J. Chikofsky
MURRAY J. CHIKOFSKY
Attorney for Plaintiff
Office & Post Office Address
342 Madison Avenue
New York, New York 10017
212 986-4225

ANSWER OF ROBERT C. SELLS,
AS LEAD UNDERWRITER

The defendants, ROBERT C. SELLS, as Lead Underwriter and all other interested Underwriters subscribing to insurance policy No. 91861, erroneously sued herein as "UNDERWRITERS AT LLOYD'S LONDON, by their attorneys, KROLL, EDELMAN, ELSER & WILSON, answering the plaintiff's complaint, respectfully allege as follows:

1. Deny any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraphs numbered "1", "2", "6", "7", "8" and "9" of the plaintiff's complaint.

2. Upon information and belief, deny each and every allegation contained in paragraph numbered "3" of the plaintiff's complaint, except admit that they subscribed to a policy of insurance No. 91861, naming JOHN B. O'MALLEY, JR. as the insured therein and for the true terms, conditions and provisions contained in said policy, the defendants beg leave to refer to the original thereof upon the trial of this action.

3. Deny each and every allegation contained in paragraph numbered "4" of the plaintiff's complaint, except admit

that NORTH STAR REINSURANCE CORP. is an insurance corporation organized under the laws of the State of New York and that it issued a policy of insurance No. NSX10186 and for the true terms, conditions and provisions contained in said policy, the defendants beg leave to refer to the original thereof upon the trial of this action.

4. Upon information and belief, deny each and every allegation contained in paragraph numbered "5" of the plaintiff's complaint, except admit that defendant, FIRST STATE INSURANCE COMPANY, is a corporation organized under the laws of the State of Delaware and issued a certain policy numbered 900427 and for the true terms, conditions and provisions contained in said policy, the defendants beg leave to refer to the original thereof upon the trial of this action.

5. Upon information and belief, deny each and every allegation contained in paragraphs numbered "10" and "11" of the plaintiff's complaint.

AS AND FOR A FIRST, SEPARATE
AND COMPLETE AFFIRMATIVE
DEFENSE, THE DEFENDANTS ALLEGE:

6. The complaint fails to state a claim against defendants, upon which relief can be granted.

WHEREFORE, the defendants demand judgment dismissing

the plaintiff's complaint, together with the costs and disbursements of this action.

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Defendants

By: /s/ Herbert Dicker
HERBERT DICKER
A Member of the Firm

ANSWER OF NORTH STAR
REINSURANCE CORP.

The defendant, NORTH STAR REINSURANCE CORP., by its attorneys, KROLL, EDELMAN, ELSER & WILSON, answering the plaintiff's complaint, respectfully alleges as follows:

1. Denies any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraphs numbered "1", "2", "6", "7", "8" and "9" of the plaintiff's complaint.

2. Upon information and belief, denies each and every allegation contained in paragraph numbered "3" of the plaintiff's complaint, except admits that ROBERT C. SELLS and other interested Underwriters subscribed to a policy of insurance No. 91861, naming JOHN B. O'MALLEY, JR. as the insured therein and for the true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

3. Denies each and every allegation contained in paragraph numbered "4" of the plaintiff's complaint, except admits that it is an insurance corporation organized under the laws of the State of New York and that it issued a policy of

insurance No. NSX10186 and for the true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

4. Upon information and belief, denies each and every allegation contained in paragraph numbered "5" of the plaintiff's complaint, except admits that defendant, FIRST STATE INSURANCE COMPANY, is a corporation organized under the laws of the State of Delaware and issued a certain policy numbered 900427 and for the true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

5. Upon information and belief denies each and every allegation contained in paragraphs numbered "10" and "11" of the plaintiff's complaint.

AS AND FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

6. The complaint fails to state a claim against defendant, upon which relief can be granted.

WHEREFORE, the defendant demands judgment dismissing the plaintiff's complaint, together with the costs and disbursements of this action.

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Defendants

By: /s/ Herbert Dicker
HERBERT DICKER
A Member of the Firm

ANSWER OF FIRST STATE
INSURANCE COMPANY

The defendant, FIRST STATE INSURANCE COMPANY, by its attorneys, KROLL, EDELMAN, ELSER & WILSON, answering the plaintiff's complaint, respectfully alleges as follows:

1. Denies any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraphs numbered "1", "2", "6", "7", "8" and "9" of the plaintiff's complaint.

2. Upon information and belief, denies each and every allegation contained in paragraph numbered "3" of the plaintiff's complaint, except admits that ROBERT C. SELLS and other interested Underwriters subscribed to a policy of insurance No. 91861, naming JOHN B. O'MALLEY, JR. as the insured therein and for the true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

3. Denies each and every allegation contained in paragraph numbered "4" of the plaintiff's complaint, except admits that NORTH STAR REINSURANCE CORP. is an insurance corporation organized under the laws of the State of New York and that it issued a policy of insurance No. NSX10186 and for the

true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

4. Upon information and belief, denies each and every allegation contained in paragraph numbered "5" of the plaintiff's complaint, except admits that it is a corporation organized under the laws of the State of Delaware and issued a certain policy numbered 900427 and for the true terms, conditions and provisions contained in said policy, the defendant begs leave to refer to the original thereof upon the trial of this action.

5. Upon information and belief, denies each and every allegation contained in paragraphs numbered "10" and "11" of the plaintiff's complaint.

AS AND FOR A FIRST, SEPARATE,
AND COMPLETE AFFIRMATIVE
DEFENSE, THE DEFENDANT ALLEGES:

6. The complaint fails to state a claim against defendant, upon which relief can be granted.

AS AND FOR A SECOND, SEPARATE
AND COMPLETE AFFIRMATIVE
DEFENSE, THE DEFENDANT ALLEGES:

7. That this defendant is a corporation organized under the laws of the State of Delaware.

UNDERWRITERS do hereby agree with the Assured, that in consideration of

8. That this defendant was not properly served with process in this action within the territorial limits or jurisdiction of this Court or pursuant to Rule 3 of the Federal Rules of Civil Procedure.

9. By reason of the premises, this Court does not have jurisdiction of the person of this defendant.

WHEREFORE, the defendant demands judgment dismissing the plaintiff's complaint, together with the costs and disbursements of this action.

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Defendants

By: /s/ John T. Elser
JOHN T. ELSER
A Member of the Firm

NOTICE OF MOTION

TO: MURRAY J. CHIKOFSKY, ESQ.
Attorney for Plaintiff
342 Madison Avenue
New York, New York 10017

PLEASE TAKE NOTICE that upon the affidavit of THOMAS W. WILSON, ESQ., sworn to the 19th day of April, 1974, all of the prior pleadings and proceedings heretofore had herein, and the exhibits annexed hereto, the defendants will move this Court before the Hon. Constance Baker Motley, at Room 1106 of the Courthouse located at Foley Square, in the Borough of Manhattan, City and State of New York, on the 3rd day of May, 1974, for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings and a dismissal of the plaintiff's complaint, together with such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
April 19, 1974

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Defendants

By: /s/ Thomas W. Wilson
THOMAS W. WILSON
A Member of the Firm
22 East 40th Street
New York, New York 10016

AFFIDAVIT

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

THOMAS W. WILSON, being duly sworn, deposes and says:

That he is a member of the firm of KROLL, EDELMAN, ELSER & WILSON, the attorneys for the defendants herein. That he is familiar with all of the prior pleadings and proceedings heretofore had herein and submits this affidavit in support of the defendants' motion for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Upon information and belief, the action was commenced by the filing of a summons and complaint on or about March 5, 1973; copies of the complaint and the defendants' answers are annexed hereto. Plaintiff seeks damages in the sum of $1,300,000. from all defendants.

In substance, the complaint alleges that the defendants issued policies of insurance on January 31, 1972, insuring JOHN B. O'MALLEY, JR. ("O'MALLEY"), a resident of the State of Colorado, against assayer's errors and omissions. Each of the defendants afforded insurance coverage in varying layers up to

$5,000,000. for each occurrence (Pars. 3, 4, and 5, complaint); that on March 15, 1972, O'MALLEY represented to the plaintiff that he was a qualified professional engineer and the holder of insurance policies issued by the defendants which insured against liability for assayer's errors and omissions (Par. 6, complaint); that in reliance upon O'MALLEY'S representations and upon the fact that the defendants had issued to O'MALLEY the errors and omissions liability policies and on further reliance on a written assay made by O'MALLEY dated March 25, 1972, the plaintiff purchased 53 metal bars for a consideration of $700,000.; the metal bars allegedly contained precious metals (Par. 7, complaint); that on October 11, 1972, plaintiff learned that the metal bars were worthless (Par. 9, complaint).

The plaintiff further alleges that the defendants knew or should have known that he would rely upon the issuance to O'MALLEY of the defendants' professional indemnity policies and that the issuance of such policies were evidence of the reputation and standing of O'MALLEY as a reputable and qualified assayer (Par. 10, complaint). The complaint also makes reference to certain Certificates of Insurance issued to the plaintiff by the defendants, copies of which are annexed hereto as exhibits.

Upon information and belief, a separate action was

having been taken or, if an appeal has been taken then until after the appeal has been

commenced in the United States District Court, Southern District of New York, by plaintiff against O'MALLEY (Stone v. O'Malley, 72 Civ. 4757), wherein the plaintiff sought to recover damages against O'MALLEY in the sum of $1,300,000., based upon the latter's representations and assay of certain metal bars which plaintiff allegedly purchased for $700,000. The action by plaintiff against O'MALLEY in this Court was thereafter transferred to the United States District Court, Denver, Colorado, pursuant to order of the Hon. Constance Baker Motley, dated May 7, 1973. The Colorado suit by plaintiff against O'MALLEY has not yet resulted in a judicial determination and is still pending. In connection with the Stone suit in Colorado, O'MALLEY has retained his own personal counsel to defend his interests therein.

Upon information and belief, the defendants, prior to the commencement of the instant action, disclaimed coverage to O'MALLEY under the policies of insurance issued by them with respect to the claim asserted by Stone. The disclaimer was based upon O'MALLEY'S breach of the insurance contract, material misrepresentations contained in the application for insurance, breach of warranty and upon certain exclusionary provisions of the Professional Indemnity Policies. It is

hereon, at the request of the Assured, will submit to the jurisdiction of any court of

respectfully submitted that the present suit is actually a direct action by a third-party against an insurance carrier arising out of the alleged wrongful acts of an insured. In substance, the plaintiff argues that by issuing the errors and omissions policies, the defendants-insurers warranted to the public that O'MALLEY, as its insured, would commit no errors and further that the insurers guaranteed the competent performance of its insured in his professional capacity.

It is respectfully submitted that such allegations do not set forth a claim for proper relief; these allegations are tantamount to an injured patient commencing an action against the liability insurer of a physician based upon the physician's alleged malpractice. No insurance carrier in the State of New York can be sued directly in the first instance by an injured patient or by an aggrieved client because of the negligent acts of a physician or other professional, in whose behalf an insurance carrier has issued a policy of professional indemnity insurance. It has never been held that an insurer, by the mere issuance of a liability policy, guarantees and/or warrants that its insured will commit no errors. It is further submitted that a third-party who is allegedly aggrieved by the negligence of one who is insured under a liability policy,

stands in no better position than does the insured with respect to coverage; and where the insured has breached a material condition of the policy so as to give rise to a disclaimer thereunder, a third-party does not have any greater rights against the insurer than does the insured.

Annexed hereto are copies of the errors and omissions policies issued to O'MALLEY by the defendants. It is respectfully submitted that the most pervasive reading of the policies clearly demonstrates that no representations are contained therein, upon which the plaintiff could possibly have relied to support the allegations in his complaint.

The Memorandum of Law submitted herewith sets forth the legal authorities in support of the defendants' proposition that the complaint should be dismissed since it fails to state a claim upon which any relief may be granted.

/s/ Thomas W. Wilson
THOMAS W. WILSON

Sworn to before me this
19th day of April, 1974.

/s/ Roy E. Pomerantz
ROY E. POMERANTZ
Notary Public, State of New York
No. 44-8405185
Qualified in Rockland County
Commission Expires March 30, 1976

ADDRESS: 902 Geneva Street

EXHIBIT "A"	-	COMPLAINT
EXHIBIT "B"	-	ANSWER, Sells
EXHIBIT "C"	-	ANSWER, First State
EXHIBIT "D"	-	ANSWER, North Star
EXHIBIT "E"	-	CERT. OF INS., Sells
EXHIBIT "E"-1	-	CERT. OF AMENDMENT
EXHIBIT "F"	-	CERT. OF INS., North Star
EXHIBIT "G"	-	CERT. OF INS., First State
EXHIBIT "H"	-	INS. POLICY, Sells
EXHIBIT "I"	-	INS. POLICY, North Star
EXHIBIT "J"	-	INS. POLICY, First State

SCHEDULE OF EXHIBITS

Defs' EXHIBIT C
5/2/73

CERTIFICATE OF INSURANCE

Underwriters at Lloyd's, London

(Not Incorporated)

Issued through

R. B. Jones & ~~Associates~~ Inc.

501 West Eleventh Street
Kansas City, Missouri

THIS IS TO CERTIFY THAT: John B. O'Malley
902 Geneva Street
Aurora, Colorado

has the following coverage for the term of One Year

from the 31st day of January 19 72

at noon to the 31st day of January 19 73

at noon covered by Certificate No. 91861

Type: Assayers Errors and Omissions Liability

Limits: 250,000. Subject to $5,000. Deductible

Location: 3275½ So. Santa Fe Drive, Englewood, Colorado and Elsewhere in U.S.A.

Issued to: Marvin Stone, Esq.
World Wide Coal & Mineral

Address: 200 Davenport Road
Toronto, 185 Canada

R. B. JONES ~~ASSOCIATES~~ INC.

Date Issued March 20, 1972 By [signature]

5051

EXHIBIT "E" CELLO

R.B. JONES inc.
Moulton Green, Jr. CPCU, vice president
301 West Eleventh Street
Kansas City, Missouri 64105
816-842-1230

March 27, 1972

Mr. Marvin Stone
World Wide Coal & Mineral
200 Davenport Road
Toronto, 185 Canada

Mr. Stone, you are hereby notified that the World Wide Coal & Mineral is hereby canceled as a holder on Certificate issued March 20, 1972 covering Assayer's Liability coverage for John B. O'Malley. The Certificate as now held by us includes only the name of Marvin Stone.

Sincerely,

Moulton Green, Jr.

CC - Ellen Makipaa

LLOYDS POLICY ASSURING CORRECTNESS OR ACCURACY OF OMALLEY'S ASSAY!

Defs' Ex. GG in id.
5/2/73 mo.

CU 0715
(Ed. 2-64)

CERTIFICATE OF INSURANCE

This is to Certify, that policies in the name of

NAMED INSURED and ADDRESS: John B. O'Malley
902 Geneva Street
Aurora, Colorado

THIS CERTIFICATE OF INSURANCE NEITHER AFFIRMATIVELY NOR NEGATIVELY AMENDS, EXTENDS OR ALTERS THE COVERAGE AFFORDED BY ANY POLICY DESCRIBED HEREIN.

are in force at the date hereof, as follows:

KIND OF INSURANCE	POLICY NUMBER	POLICY PERIOD	LIMITS OF LIABILITY	
			BODILY INJURY	PROPERTY DAMAGE
WORKMEN'S COMPENSATION		Eff. Exp.	Provided by Workmen's Compensation Law—State of	Nil
COMPREHENSIVE GENERAL LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence $,000 Aggregate	$,000 Each occurrence $,000 Aggregate
MANUFACTURERS' AND CONTRACTORS' LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
OWNERS', LANDLORDS' AND TENANTS' LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
CONTRACTUAL LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
AUTOMOBILE LIABILITY ☐ Owned Automobiles ☐ Hired Automobiles ☐ Non-Owned Automobiles		Eff. Exp.	$,000 Each person $,000 Each accident	$,000 Each accident
COMPREHENSIVE AUTOMOBILE LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence
OTHER: Excess Assayers errors & Omissions Liability.	NSX 10186	Eff. 2-4-72 Exp. 2-4-73	$750,000. Each Occurrence Excess of	$250,000.

In the event of any material change in, or cancellation of, said policies, the undersigned company will endeavor to give written notice to the party to whom this certificate is issued, but failure to give such notice shall impose no obligation nor liability upon the company.

Dated: March 20, 1972

Name of Company: North Star Reinsurance Corp.

R. B. Jones Inc.

By _____
AUTHORIZED REPRESENTATIVE

CERTIFICATE ISSUED TO:

NAME and ADDRESS: Marvin Stone, Esq.
World Wide Coal & Mineral
200 Davenport Road
Toronto, 185 Canada

Defs' Ex HH in
5/2/73 MD

CU 6715
(Ed. 2-68)

CERTIFICATE OF INSURANCE

This is to Certify, that policies in the name of

NAMED INSURED and ADDRESS: John B. O'Malley and Applied Chemicals, Inc.
902 Geneva Street
Aurora, Colorado

THIS CERTIFICATE OF INSURANCE NEITHER AFFIRMATIVELY NOR NEGATIVELY AMENDS, EXTENDS OR ALTERS THE COVERAGE AFFORDED BY ANY POLICY DESCRIBED HEREIN.

are in force at the date hereof, as follows:

KIND OF INSURANCE	POLICY NUMBER	POLICY PERIOD	LIMITS OF LIABILITY	
			BODILY INJURY	PROPERTY DAMAGE
WORKMEN'S COMPENSATION		Eff. Exp.	Provided by Workmen's Compensation Law—State of	NIL
COMPREHENSIVE GENERAL LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence $,000 Aggregate	$,000 Each occurrence $,000 Aggregate
MANUFACTURERS' AND CONTRACTORS' LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
OWNERS', LANDLORDS' AND TENANTS' LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
CONTRACTUAL LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence $,000 Aggregate
AUTOMOBILE LIABILITY ☐ Owned Automobiles ☐ Hired Automobiles ☐ Non Owned Automobiles		Eff. Exp.	$,000 Each person $,000 Each accident	$,000 Each accident
COMPREHENSIVE AUTOMOBILE LIABILITY		Eff. Exp.	$,000 Each person $,000 Each occurrence	$,000 Each occurrence
OTHER: Excess Umbrella Including Assayers Errors & Omission Liability	#900286	Eff. 2-7-72 Exp. 2-7-73	$4,000,000. each occurrence excess of $100,000./300,000. BI $100,000. PD General & Auto Liability and $1,000,000. Assayers errors and omissions, including S.I.R. If Any.	

In the event of any material change in, or cancellation of, said policies, the undersigned company will endeavor to give written notice to the party to whom this certificate is issued, but failure to give such notice shall impose no obligation nor liability upon the company.

Dated: March 20, 1972et

Name of Company: First State Insurance Company

R. B. Jones Inc.

By ..... AUTHORIZED REPRESENTATIVE

CERTIFICATE ISSUED TO:

NAME and ADDRESS:
Marvin Stone, Esq.
World Wide Coal & Mineral
200 Davenport Road
Toronto, 185 Canada

EXHIBIT "G" - FIRST STATE

SCHEDULE

ERRORS AND OMISSIONS INSURANCE

Name of Assured JOHN D. O'REILLY, P.E. ENGINEER

Address 900 CENTRAL STREET

AURORA, COLORADO 80010

Professional Capacity For Which Coverage Is Afforded MECHANICAL ENGINEERS, CHEMISTRY METALURGICAL ANALYSIS

Premium $4,500.00

Date Of Proposal DECEMBER 17, 1971

Certificate Period JANUARY 31, 1972 TO JANUARY 31, 1973

Limits of Liability and Deductible:

The liability of Underwriters for each claim under the certificate shall never exceed $ 250,000.00

and, subject to that limit for each claim, the total limit of the Underwriters' liability for all claims during the certificate shall not exceed in the aggregate $250,000.00

The Limit of liability afforded under the certificate shall be subject to the deductible amount of $ 5,000.00 *which shall be applicable to each claim and shall include loss payments and adjustments, investigation and legal fees and costs, whether or not loss payment is involved.*

Retroactive Date JANUARY 31, 1972

Notification of Claim or Incident shall be given to:

Kroll, Edelman ~~and Lanzone~~ CLARK & WILSON
22 East 40th Street
New York, New York 10016
Tel: (212) 686-2686

The Person or Persons upon whom Service of Process may be made in any action against Underwriters is/are ~~Kroll and Bauer~~
21 William Street
New York, New York

Attached to and forming a part of 91851

ILLINOIS R. B. JONES INC.

By _____

-- EXHIBIT "H" - Sells' Policy --

NIL Premium $ NIL

LIMITATION WORDING

COVERAGE HEREUNDER LIMITED TO LABORATORY TESTING OF MATERIALS ONLY.

WARRANTED: THAT ONLY ESTABLISHED TESTING METHODS AS SET OUT IN APPLICANT'S LETTER DATED JANUARY 10, 1972 (ATTACHED) TO BE USED AND THAT A SAMPLE OF ALL ASSAYED MATTER BE KEPT FOR USE IN ANY FURTHER DISPUTE, IF ANY.

All other terms and conditions remain unchanged.

This endorsement to take effect on the 31ST day of JANUARY 19 72

Attached to and forming part of No. 91851 Underwriters at Lloyd's London, England,

Issued to JOHN D. O'MALLEY, PROF. ENGINEER

ILLINOIS R. B. JONES INC.
Resident Agent

RBJ 26 ILL

By

BROKER'S COPY

ENDORSEMENT (No. 1)

NIL Premium $ NIL

PRIOR ACTS EXCLUSION CLAUSE

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THE CERTIFICATE WORDING TO WHICH THIS ENDORSEMENT IS ATTACHED THIS CERTIFICATE SHALL NOT COVER ANY CLAIM OR CLAIMS ARISING OR ALLEGED TO HAVE ARISEN FROM THE PERFORMANCE OF ANY ACT, CONDUCT OR SERVICE RENDERED BY OR ON BEHALF OF THE ASSURED PRIOR TO THE DATE SHOWN IN THE SCHEDULE AS THE RETROACTIVE DATE.

ARCHITECTS AND ENGINEERS
PROFESSIONAL INDEMNITY INSURANCE

UNDERWRITERS do hereby agree with the Assured, that in consideration of the Assured's promise and undertaking to make the payment of the premium stated in the Schedule and to pay the deductible as described herein, and in reliance upon the Statements in the Proposal made a part hereof, and subject to the limit of the liability of this Insurance as set forth in the Schedule and as defined herein, and the exclusions, conditions and other terms of the Certificate, as follows:-

1. To pay on behalf of the Assured the applicable part required herein to be paid by Underwriters of such sums which the Assured shall become legally obligated to pay as damages for claim or claims made against the Assured during the Certificate period by reason of any negligent act, error or omission committed or alleged to have been committed by the Assured solely while in the performance of professional services as described in the Schedule which are rendered by and on behalf of the named Assured in their said professional capacity, PROVIDED ALWAYS THAT,

(a) Such negligent act, error or omission is committed or alleged to have been committed during the Certificate period, or if committed or alleged to have been committed prior to the Certificate period, then only if the Assured had no knowledge of such act, error or omission on the effective date of this Certificate and no other valid and collectible insurance is available to the Assured, for any such prior negligent act, error or omission and provided further that,

(b) Such negligent act, error or omission has been committed or alleged to have been committed within and results in damage solely within the territory of the Continent of the United States of America, the State of Hawaii or Canada, and suit for which is commenced in a court situate in the aforesaid territory.

2. DEFINITION OF CERTIFICATE PERIOD. The term "Certificate period" whenever used in this Certificate shall mean the period from the inception date of this Certificate to the Certificate expiration date or its earlier termination date, if any.

3. DEFINITION OF ASSURED. The unqualified word "Assured" whenever used in this Certificate shall mean the named Assured designated in the Schedule and any partner, director, officer or salaried employee of the named Assured while acting in the course of his duties performed by him for and on behalf of the named Assured solely in their professional capacity as described in the Schedule.

4. EXCLUSIONS. (1) This Insurance does not apply to claims for or arising out of:

(a) Any claim or circumstances which have been set forth in answer to Question 16 (A) and (B) in any proposal forms submitted on behalf of the Assured to obtain this Insurance.

(b) Activities in connection with tunnels, bridges, (either of which exceed 150 feet in length) and in connection with dams including the erection and constructions, plans, designs and maintenance thereof, unless specifically endorsed hereon.

(c) *The making of or absence of boundry surveys, surveys of the subsurface conditions, or ground testing, unless specifically endorsed hereon.*

(d) *Activities in connection with fairs or exhibitions (but this exclusion only applies to structures which, when they are designed, are expected to be demolished at the time the fair or exhibition closes) unless specifically endorsed hereon.*

(e) *Express warranties or guarantees, estimates of probable construction cost or cost estimates being exceeded.*

(f) *The failure to complete drawings, specifications or schedules of specifications on time, or the failure to act upon shop drawings on time, but this exclusion does not apply if such failures are the result of any negligent act, error or omission in the drawings, plans, specifications, schedules of specifications or shop drawings.*

(g) *The advising or requiring of or failure to advise or require or failure to maintain any form of Insurance suretyship or bond, either with respect to the Assured or any other person.*

(h) *Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, including the cost of removing, nullifying or cleaning-up, or preventing such seepage, pollution or contamination.*

(i) *The conduct of any business enterprise that is wholly or partially owned, operated or managed by the Assured other than liability arising out of the named Assured's professional activities as described in the Schedule.*

(j) *Any negligent act, error or omission of the Assured which is not connected with the customary or usual professional services rendered to others by the Assured in the Assured's professional capacity as described in the Schedule.*

(k) *Liability assumed by the Assured under any contract or agreement, either oral or in writing unless specifically endorsed hereon.*

(l) *Any obligation for which the Assured or its Insurer, other than the Underwriters herein, may be liable under any Workmen's Compensation Law, Unemployment Compensation Law, Employers Liability Law, Disability Benefits Law, or under any similar law.*

(m) *Personal Injury, sickness, bodily injury, disease or death to any employee of the Assured arising out of and in the course of his employment by the Assured, or to any third party claim of any kind in connection therewith.*

(n) *The ownership, leasing, rental, maintenance, operation or use, including loading or unloading by or in the interest, or at the direction of the Assured of watercraft, automobiles, motor vehicles, aircraft, or mobile vehicles of any kind, or the ownership, rental leasing, maintenance, use or repair of any real or personal property.*

(o) *Property damage to property owned by, rented or leased to the Assured.*

(p) *The infringement of any copyright, trademark, or patent*

(q) The insolvency or bankruptcy of the Assured or any other person, firm or organization.

(r) Dishonest, fraudulent, criminal, malicious or knowingly wrongful acts or omissions committed intentionally by or at the direction of any Assured.

(s) Libel, slander, invation of privacy, assault or battery or conversion.

(t) Liability of any kind based upon, involving or arising out of the conduct of any individual, corporation, partnership, or joint venture of which the Assured is a partner, officer or member which is not designated in the declarations as a named Assured.

(u) Fines, penalties, punitive or exemplary damages, except that if a suit shall have been brought against the Assured on a claim falling within the coverage hereof, seeking both compensatory and punitive or exemplary damages, then the Underwriters will afford a defense to such action, without any liability, however, for such punitive or exemplary damages.

(v) Opinions other than of fact materials and claims arising from any financial [illegible]

(2) This Certificate does not apply to claims made against the Assured:

(a) By a business enterprise (or its assignees) that is wholly or partly owned, operated or managed by the Assured.

(b) By an employee (or its assigns) of said business enterprise, or

(c) By an employee (or his assignees) of a contractor or subcontractor of said business enterprise.

CONDITIONS

5. LIMITS OF LIABILITY AND DEDUCTIBLE. The liability of the Underwriters for each claim shall never exceed the amount stated in the Schedule for "each claim", and, subject to that limit for each claim, the total limit of the Underwriters' liability for all claims during the Certificate period, as covered hereunder, shall never exceed the amount stated in the Schedule as "aggregate". The inclusion herein of more than one Assured or the making of claims or the bringing of suits by more than one person or organization, shall not operate to increase the limit of the Underwriters' liability for each claim and in the aggregate. The deductible amount stated in the Schedule applicable to each claim shall include loss payments, and adjustment, investigation and legal fees and costs, whether or not loss payment is involved. The determination by the Underwriters as to the reasonableness of the adjusting costs, investigation costs and legal fees and costs shall be conclusive on the Assured. Subject to the deductible amount, it is agreed that the Assured, upon demand by the Underwriters will pay such part of the adjustment, investigation and legal fees and costs as written demand may be made therefor and within ten days of such demand. Subject to the deductible amount, it is further agreed that in the event of any loss payment being required herein, the Assured shall make payment of the required deductible amount within ten days of written demand therefor. In the event of any failure by the Assured to pay either of the aforesaid deductible amounts, Underwriters shall have the option to cancel this Certificate in accordance with the provisions contained herein.

6. DEFENSE, SETTLEMENT, COOPERATION. The Underwriters will defend any suit against the Assured seeking damages to which this insurance applies, even if any of the allegations of the suit are groundless, false or fraudulent and it is agreed that the Underwriters may make such investigation and settlement of any claim or suit as they deem expedient, but the Underwriters shall not be obligated to pay any claim or

Claimant and full information with respect [illegible] stances of the event complained of and the names and addresses of the injured and of available witnesses, shall be given by or for the Assured to the Underwriters or any of their authorized representatives as soon as practicable.

(b) If written claim is made or suit is brought against the Assured, the Assured shall immediately forward to the Underwriters every demand, notice, summons or other process received by him or his representative.

(c) The Assured shall cooperate with the Underwriters and, upon the Underwriters' request shall submit to examination and interrogation by a representative of the Underwriters, under oath if required, and shall attend hearings, depositions and trials and shall assist in effecting settlement securing and giving evidence, obtaining the attendance of witnesses in the conduct of suits, as well as in the giving of a written statement or statements to the Underwriters' representatives, and meetings with such representatives for the purpose of investigation and/or defense and all without charge to the Underwriters.

CANCELLATIONS. This Certificate may be cancelled by the named Assured by surrender thereof to the Underwriters or any of their authorized representatives or by mailing to the Underwriters written notice stating when thereafter the cancellation shall be effective. This Certificate may be cancelled by the Underwriters by mailing to the named Assured at the address shown in the Schedule a written notice stating when, not less than ten days thereafter, such cancellation shall become effective. The time of the surrender or the effective date and hour of cancellation stated in the notice shall terminate the Certificate period. The mailing of such notice as aforesaid, whether by ordinary mail or by certified mail, shall be sufficient proof of such notice. Delivery of such written notice, whether by the named Assured or by the Underwriters, shall be equivalent to mailing. If the named Assured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the Underwriters cancel, earned premium shall be computed pro-rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable thereafter, but payment or tender of unearned premium is not a condition of cancellation by the Underwriters. Notwithstanding any of the foregoing should the Assured fail to pay the required deductible amount within ten days of written demand therefor, Underwriters at their option may cancel this Certificate and the amount of the earned premium shall be computed in accordance with the customary short rate table and procedure, and such portion of the premium that would be refundable to the Assured shall be retained by Underwriters and applied to the amount of the deductible, subject however to the understanding that any monies remaining after payment of the aforesaid deductible shall be refunded to the Assured.

EXHIBIT "J" - Policy, First State Insurance Co.

Underwriters by the Assured to recover for any loss under this Insurance Certificate unless, as a condition precedent thereto, the Assured will have fully complied with all terms and conditions of this Insurance Certificate, nor until the amount of such loss has been fixed or rendered certain either by final judgement against the Assured after trial of the issues and the time to appeal therefrom has expired without an appeal having been taken or, if an appeal has been taken then until after the appeal has been determined, or by agreement between the parties with the written consent of the Underwriters. In no event shall any action be maintained against the Underwriters by the Assured or any other persons unless brought within twelve months after the right of action accrued hereon.

Nothing contained in this Certificate shall give any person or organization any right to join the Underwriters as a defendant or co-defendant or other party in any action against the Assured to determine the Assured's liability.

OTHER INSURANCE. This Insurance shall be excess insurance over any other valid and collectible insurance available to the Assured.

ASSIGNMENT. This Certificate shall be void if assigned or transferred without the written consent of Underwriters. However, if the Assured shall die or be adjudged imcompetent, this Certificate shall cover the Assured's legal representative as the Assured with respect to liability previously incurred and covered by this Certificate.

APPLICATION. By acceptance of this Certificate, the named Assured agrees that proposal shall be deemed part of this Certificate and that the statements therein are his agreements, representations and warranties which shall be deemed continuing during the term of this Certificate, and that this Certificate is issued in reliance upon the truth thereof, and that this Certificate embodies all agreements existing between himself and the Underwriters or any of their representatives relating to this Insurance.

EXTENDED DISCOVERY. If during the Certificate period the Assured shall become aware of any circumstances which may subsequently give rise to a claim against the Assured by reason of any negligent act, error or omission for which coverage would be afforded hereunder and if the Assured shall during the Certificate period herein give written notice to the Underwriters of such event, any claim which may subsequently be made against the Assured arising out of such negligent act, error or omission shall be deemed for the purposes of this Insurance to have been made during the Certificate period stated in the Schedule.

NOTICE OF CLAIM OR INCIDENT. The Assured, upon notice of any claim or of an incident or circumstances likely to give rise to a claim hereunder, shall give immediate written advice thereof to the Underwriters through Underwriters' representative designated in the Schedule, who are hereby authorized to investigate any such claim, incident, or circumstances on behalf of Underwriters.

with the statutes of the state wherein this Certificate is issued are hereby amended to conform to such statutes.

SERVICE OF SUIT CLAUSE. It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon the person or persons specified for the purpose in the said Schedule and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The said person or persons are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this contract of insurance and hereby designate the above named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

LPL.A&E.70

EXHIBIT "J" - Policy, First State Insurance Co.

175 West Jackson Blvd.
Chicago, Ill. 60604

Attn: Mr. Richard A. Oldani

Dear Mr. Oldani:

The portion of my work, on which I am applying for insurance consists of chemical recovery analysis of ore and metal samples containing precious (gold, silver, platinum and platinum family) elements. These samples are delivered to me in Denver, Colorado and in no way am I responsible for the quantity or quality of the "in-place" material - only the value of the sample presented. The resume, which I left you on Friday, January 7, 1972 shows the qualifications which I have for this insurance to do this work.

This analytical work is done in accordance with detail procedures explained in Shepherd's and Deitrich's book on Fire Assay. These gentlemen were on the facualty of Stanford University. Also in accordance with similar and expanded detail information presented in Bugby's Assay Book. Mr. Bugby was on the facualty of Massachusetts Institute of Technology at the time he wrote his book.

Please direct your quotation, if this insurance is available, directly to me. It was very nice to meet you and thank you for your cooperation.

Sincerely Yours,

John B. O'Malley, Jr.
Controlling Engineer

P. S. - "In-place" material refers to the material at the mine site and it is this material that he has no responsibility for.

— EXHIBIT "H"-Applicant's Letter —

12-1 tioning of such products or work;

ownership, maintenance, operation, use, loading, or unload-
ing of aircraft owned by the Insured;

— EXHIBIT "J" - Policy, First State Insurance Co. —

Item 1. INSURED: John O'Malley, Professional Engineer

ADDRESS: 902 Geneva Street
Aurora, Colorado

Item 2. UNDERLYING INSURANCE:

Carrier	Form of Coverage	Limits
Underwriters at Lloyds and Companies	Architects and Engineers Professional Liability	$250,000 each claim and in all excess of $5,000 each claim retained by the insured

Item 3. LIMIT(S) OF COVERAGE HEREUNDER:

$750,000 each claim in excess of $250,000 each claim in turn excess of the amount of each claim retained by the insured and covering only as per limitations set forth in the primary policy

Item 4. PREMIUM: $4,500.00

Item 5. CANCELLATION: Thirty (30) Days

Item 6. PERIOD OF COVERAGE HEREUNDER: February 4, 1972 to January 31, 1973

U-106 5-70 C.P.

__EXHIBIT "I" - Policy, North Star Reinsurance Corp. __

__ EXHIBIT "J" - Policy, First State Insurance Co. __

THAT IN THE EVENT OF REDUCTION OR EXHAUSTION OF THE AGGREGATE LIMITS OF LIABILITY UNDER SAID UNDERLYING INSURANCE BY REASON OF LOSSES PAID THEREUNDER, THIS POLICY SHALL NOT

(1) IN THE EVENT OF SUCH REDUCTION PAY THE EXCESS OF THE REDUCED UNDERLYING LIMIT

(2) IN THE EVENT OF EXHAUSTION CONTINUE IN FORCE AS UNDERLYING INSURANCE

Nothing herein contained shall vary, alter or extend any agreement, provision, general condition or declaration of the Contract other than as above stated.

In Witness Whereof, the NORTH STAR REINSURANCE CORPORATION has caused this Endorsement to be signed by its President and Secretary at New York, New York, but the same shall not be binding upon the Reinsurer unless countersigned by another officer of the Reinsurer.

David Thompson
Secretary

President

Countersigned at New York, New York this 28th day of February, 19 72.

NORTH STAR REINSURANCE CORPORATION

EXHIBIT "J" - Policy, First State Insurance Co.

(hereinafter called the "Reinsured").

WHEREAS an insurance company or companies have issued to the Reinsured a policy or policies of insurance as shown in Item 2 of the Declarations, hereafter referred to as the "underlying insurance".

AND WHEREAS the Reinsured desires additional reinsurance to apply in excess of the underlying insurance.

REINSURING AGREEMENT

NOW THEREFORE this Certificate is to further indemnify the Reinsured against ultimate net loss arising out of the hazards covered and as defined in the underlying insurance but only up to an amount not exceeding the limit(s) shown in Item 3 of the Declarations.

PREMIUM

THE PREMIUM DUE the Reinsurer for this excess insurance shall be shown in Item 4 of the Declarations payable upon delivery of this Certificate.

NOTICE OF LOSS

THE REINSURED shall immediately advise the Reinsurer of any accident or occurrence which appears likely to result in liability under this Certificate and of subsequent developments likely to affect the Reinsurer's liability hereunder. The Reinsurer shall not, however, be called upon to assume charge of the settlement or defense of any claims made or suits brought or proceedings instituted against the Reinsured, but shall have the right and opportunity to be associated with the Reinsured in the defense and trial of any such claims, suits or proceedings relative to any accident or occurrence which, in the opinion of the Reinsurer may create liability on the part of the Reinsurer under the terms of the Certificate. If the Reinsurer avails itself of such right and opportunity, the Reinsured and the Reinsurer shall cooperate in all respects so as to effect a final determination of the claim or claims. Failure on the part of the Reinsured to cooperate shall relieve the Reinsurer, at its option, of liability under this Certificate.

LOSS ADJUSTMENT

UPON FINAL DETERMINATION by settlement, award or verdict of the liability of the Reinsured, the Reinsurer shall promptly pay the Reinsured as the Reinsured shall pay and shall have actually paid, the amount of any ultimate net loss coming within the terms and limits of this excess reinsurance.

ULTIMATE NET LOSS, as used herein, shall be understood to mean the sums paid in settlement of losses for which the Reinsured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the underlying insurance, policies of coinsurance, or policies specifically in excess hereof), whether recoverable or not, and shall exclude all "Costs".

THE WORD "COSTS" shall be understood to mean interest on judgments, investigation, adjustment and legal expenses including taxed court costs and premiums on bonds, for which the Reinsured is not covered by the underlying insurance (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Reinsured).

COSTS INCURRED BY THE REINSURED, with the written consent of the Reinsurer shall be apportioned as follows:

(a) In the event of claim or suit arising which appears likely to exceed the Primary Limit or Limits, no Costs shall be incurred by the Reinsured without the written consent of the Reinsurer.

(b) Should such claim or suit be settled previous to going into court for not more than the Primary Limit or Limits, then no Costs shall be payable by the Reinsurer.

(c) Should, however, the sum for which the said claim or suit may be settled exceed the Primary Limit or Limits, then the Reinsurer if it approves such settlement or consents to the proceedings continuing, shall contribute to the Costs incurred by the Reinsured in the ratio that its proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.

(d) In the event the Reinsured elects not to appeal a judgment in excess of the Primary Limit or Limits, the Reinsurer may elect to conduct such appeal at its own cost and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of the Reinsurer exceed its limit or limits of liability as stated above, plus the costs of such appeal.

(e) In the event a judgment is rendered in excess of the Primary Limit or Limits and the underlying insurance company-(ies) elect to appeal such judgment, the duty of obtaining an appeal bond in regard to liability in excess of the Primary Limit or Limits shall rest with the Reinsured and its Primary Carrier.

ALL SALVAGES, recoveries or payments recovered or received subsequent to a loss settlement under this Certificate shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Reinsured and the Reinsurer, provided always that nothing in this clause shall be construed to mean that losses under this Certificate are not recoverable until the Reinsured's ultimate net loss has been finally ascertained.

NOTHING HEREIN CONTAINED shall be construed to mean that the Reinsured shall be required to enforce by legal action any right of subrogation or indemnity before the Reinsurer shall pay any loss covered hereunder.

U-105 7-68 C.P.

EXHIBIT "J" - Policy, First State Insurance Co.

Copy received
Kroll Edelman Fisher & Wilson
5:10 PM
9/4/75
By G F Kenney